

not and does not propose to be a participant in the distribution of the security to which the registration statement relates; and

(b) Such broker or dealer receives no consideration, directly or indirectly, in connection with the publication and distribution of such information, opinions or recommendations from the registrant, a selling security holder or any participant in the distribution or any other person interested in the securities to which the registration statement relates, and such information, opinions or recommendations are not published or distributed pursuant to any arrangement or understanding, direct or indirect, with such registrant, underwriter, dealer, or selling security holder; *Provided, however*, That nothing herein shall forbid payment of the regular subscription or purchase price of the document or other written communication in which such information, opinions or recommendations appear.

(Secs. 6, 7, 10, 19(a), 48 Stat. 78, 81, 85; secs. 205, 109, 48 Stat. 906, 908; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; 15 U.S.C. 77f, 77g, 77j, 77s(a))

[49 FR 37573, Sept. 25, 1984]

**§ 230.138 Definition of “offer for sale” and “offer to sell” in sections 2(10) and 5(c) in relation to certain publications.**

(a) Where a registrant which meets the requirements of paragraph (c)(1), (c)(2) or (c)(3) of this section proposes to file, has filed or has an effective registration statement under the Act relating solely to a nonconvertible debt security or to a nonconvertible, nonparticipating preferred stock, publication or distribution in the regular course of its business by a broker or dealer of information, opinions or recommendations relating solely to common stock or to debt or preferred stock convertible into common stock of such registrant shall not be deemed to constitute an offer for sale or offer to sell the security to which such registration statement relates for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*) even though such broker or dealer is or will be a participant in the distribution of the security to which such registration statement relates.

(b) Where a registrant which meets the requirements of paragraph (c)(1), (c)(2) or (c)(3) of this section proposes to file, has filed or has an effective registration statement under the Act relating solely to common stock or to debt or preferred stock convertible into common stock, the publication or distribution in the regular course of its business by a broker or dealer of information, opinions or recommendations relating solely to a nonconvertible debt security, or to a nonconvertible nonparticipating preferred stock shall not be deemed to constitute an offer for sale or offer to sell the security to which such registration statement relates for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*), even though such broker or dealer is or will be a participant in the distribution of the security to which such registration statement relates.

(c)(1) The registrant meets all of the conditions for the use of Form S-2 [§239.12 of this chapter] or Form F-2 [§239.32 of this chapter];

(2) The registrant meets the registrant requirements of Form S-3 [§239.13 of this chapter] or Form F-3 [§239.33 of this chapter]; or

(3) The registrant is a foreign private issuer which meets all the registrant requirements of Form F-3 [§239.33 of this chapter], other than the reporting history provisions of paragraph A.1. and A.2.(a) of General Instruction I of such form, and meets the minimum float or investment grade securities provisions of either paragraph B.1. or B.2. of General Instruction I. of such form and the registrant's securities have been traded for a period of at least 12 months on a designated offshore securities market, as defined in §230.902(a).

*Instruction to Rule 138:* When a registration statement relates to securities which are being registered for an offering to be made on a continuous or delayed basis pursuant to Rule 415(a)(1)(x) under the Act (§230.415(a)(1)(x)) and the securities which are being registered include classes of securities which are specified in both paragraphs (a) and (b) of this section on either an allocated or unallocated basis, a broker or dealer may nonetheless rely on:

1. Paragraph (a) of this section when the offering in which such broker or dealer is or will be a participant relates solely to classes

## Securities and Exchange Commission

## § 230.139

of securities specified in paragraph (a) of this section, and

2. Paragraph (b) of this section when the offering in which such broker or dealer is or will be a participant relates solely to classes of securities specified in paragraph (b) of this section.

[60 FR 6965, Feb. 6, 1995]

### **§ 230.139 Definition of “offer for sale” and “offer to sell” in sections 2(10) and 5(c) in relation to certain publications.**

Where a registrant which is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or which is a foreign private issuer meeting the conditions of paragraph (a)(2) of this section proposes to file, has filed or has an effective registration statement under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) relating to its securities, the publication or distribution by a broker or dealer of information, an opinion or a recommendation with respect to the registrant or any class of its securities shall not be deemed to constitute an offer for sale or offer to sell the securities registered or proposed to be registered for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*), even though such broker or dealer is or will be a participant in the distribution of such securities, if the conditions of paragraph (a) or (b) of this section have been met:

(a)(1) The registrant meets the registrant requirements of Form S-3 (§239.13 of this chapter) or Form F-3 (§239.33 of this chapter) and the minimum float or investment grade securities provisions of either paragraph (B) (1) or (2) of General Instruction I of the respective form and such information, opinion or recommendation is contained in a publication which is distributed with reasonable regularity in the normal course of business; or

(2) The registrant is a foreign private issuer that meets all the registrant requirements of Form F-3 (§239.33 of this chapter), other than the reporting history provisions of paragraphs A.1. and A.2.(a) of General Instruction I of such form, and meets the minimum float or investment grade securities provisions of either paragraph B.1. or B.2. of General Instruction I of such form, and the registrant's securities have been traded

for a period of at least 12 months on a designated offshore securities market, as defined in §230.902(a), and such information, opinion or recommendation is contained in a publication which is distributed with reasonable regularity in the normal course of business.

(b)(1) Such information, opinion or recommendation is contained in a publication which:

(i) Is distributed with reasonable regularity in the normal course of business and

(ii) Includes similar information, opinions or recommendations with respect to a substantial number of companies in the registrant's industry, or sub-industry, or contains a comprehensive list of securities currently recommend by such broker or dealer.

(2) Such information, opinion or recommendation is given no materially greater space or prominence in such publication than that given to other securities or registrants; and

(3) An opinion or recommendation as favorable or more favorable as to the registrant or any class of its securities was published by the broker or dealer in the last publication of such broker or dealer addressing the registrant or its securities prior to the commencement of participation in the distribution.

*Instructions to Rule 139:* 1. For purposes of paragraph (a), a research report has not been distributed with *reasonable regularity* if it contains information, an opinion, or a recommendation concerning a company with respect to which a broker or dealer currently is not publishing research.

2. Where projections of a registrant's sales or earnings are included, the publication must comply with the following in order to meet paragraphs (b)(1) and (b)(3).

A. The projections must have been published previously on a regular basis in order for the publication to meet paragraph (b)(1)(i);

B. The projections must be included with respect to either a substantial number of companies in the registrant's industry or sub-industry or all companies in a comprehensive list which is contained in the publication, and must cover the same periods with respect to such companies as with respect to the registrant, in order to meet the requirements of paragraph (b)(1)(ii); and